

# **Alfred E. Ramey v. U.S. General Accounting Office**

**Docket No. 01-703-17-81**

**Date of Decision: October 19, 1981**

**Cite as: Ramey v. GAO (10/19/81)**

**Before: Levan (Presiding Member), Taylor, and Meagher**

**Age Discrimination in Promotion**

**Sex Discrimination in Promotion**

**Reprisal for Exercise of Appeal Rights**

**Disparate Treatment Standard of Proof**

## **Background**

This case came before the Board on a Petition for Review and Request for Hearing filed by Petitioner on May 15, 1981. The Board issued a Notice of Hearing on May 19, 1981, scheduling the Hearing for July 7, 1981. The Respondent filed a Request for Discovery on June 16, 1981, to which the Petitioner (through private counsel) filed a Response to the discovery request. Simultaneously, the Petitioner (through private counsel) filed a Request for Discovery. By letter dated July 1, 1981, the Board advised the parties that the underlying EEO Investigative File developed by the Respondent would be entered as part of the record in the Hearing scheduled for July 7, 1981 (Exhibits A through AA). On July 9, 1981, the Board received a document entitled Amendment and Supplement to Complaint of Discrimination, amending the original complaint of discrimination of the Petitioner to allege reprisal against the Petitioner by the Respondent's denial of the Petitioner's within-grade salary increase due on June 14, 1981. A Hearing was conducted on this Petition for Review beginning on July 7, 1981, and continuing on July 30, July 31, and August 4, 1981. In addition, pursuant to a Notice of Deposition for purpose of discovery, the deposition of Richard Dasher was conducted on July 22, 1981.

## **Findings of Fact**

The Petitioner is a white male, 51 years of age, working as a GS-13, Senior Financial Systems Analyst, within the Accounting and Financial Management Studies Division of the Respondent. On September 22, 1980, the Petitioner initiated an informal complaint of discrimination against his immediate supervisor, Jack D. Kearns, Group Director, Financial Management Group, and Mr. Kearns' immediate supervisor, Joseph J. Donlon, Senior Group Director for the same Group. The complaint alleged discrimination because of age (over 40) and sex (male). In essence, the Petitioner alleged that he was not selected for the position of Computer Systems Analyst, GS-14, because of his sex and age. This position was filled on or about September 10, 1980, by Mr. Kearns, the selecting official. The individual selected, Norma K. Drake, is a white female under the age of 40. The Petitioner filed a formal complaint of discrimination on October 6, 1980. A final decision on this complaint of discrimination was issued by the Acting Comptroller General on April 22, 1981, concluding that Petitioner had not been discriminated against when he was not selected for the GS-14 position in September 1980.

On April 14, 1981, the Petitioner was issued a "warning of possible denial of within-grade increase" by the Director, Accounting and Financial Management (AFM) Division. On June 12, 1981, the Director, AFM Division, denied the Petitioner's within-grade salary increase due on June 14, 1981. By letter dated June 26, 1981, the Petitioner (through counsel) appealed this denial of within-grade salary increase to the Acting Comptroller General, alleging that the denial of this within-grade salary increase was in the nature of retaliation for his having filed a complaint of discrimination on October 6, 1980, against his supervisors. Consistent with the appeal of the denial of the within-grade salary increase, the Petitioner amended and supplemented his original EEO complaint to allege retaliation and reprisal on the part of his immediate supervisor and other supervisors in the chain of command up to and including the Director of the Division, Mr. L.L. Scantlebury, now deceased. Since this complaint of retaliation has been filed with the Board as an amendment to the original EEO complaint and to the Petition for Review and is based on the same underlying facts, the Board considers this allegation to be within the purview of the matters presently before it.

Finally, the Board takes note that this Petition for Review includes an extensive set of exhibits and hundreds of pages of hearing transcripts. In evaluating this case the Board has reviewed and considered all exhibits and the entire set of transcripts. This Decision makes reference to the exhibits and the transcripts as appropriate.

### **Contentions of the Parties**

Essentially, the Petition for Review asserts two issues here: (1) Petitioner was denied promotion to a GS-14 position because of his age and sex; and (2) as a result of his filing a complaint of discrimination on the basis of his nonselection for the referenced GS-14 position, management retaliated against Petitioner by denying his within-grade salary increase.

As a third issue, the Petitioner has alleged that his reclassification which occurred on July 30, 1981, was also in retaliation for his having filed his earlier complaint of discrimination. Further, other contentions and allegations were alluded to or suggested by the Petitioner (through counsel) at the Hearing, but were subsequently withdrawn or not pursued by the Petitioner. Accordingly, the Board renders this Decision primarily on the above-referenced allegations of the Petitioner.

The Respondent has denied the substance of all three allegations.

### **Analysis**

As an initial matter, the Board rejects the contention of the Petitioner (issue number three) that the job reclassification which he received on July 30, 1981, was in retaliation for his having filed a complaint of discrimination against his immediate supervisors, Kearns and Donlon. A review of pages 94 to 98 of the hearing transcript for July 30, 1981, indicates that the matter was initially raised by counsel for Petitioner at the Hearing and that an exhibit (Petitioner's Exhibit No. PP) was entered into evidence to substantiate the allegation. However, the Petitioner did not develop the matter or provide any other evidence to substantiate the allegation. Moreover, a review of the testimony of Gloria Gatewood, secretary to Richard Maycock, formerly Group Director for the Financial Systems Group, Accounting and Financial Management Division, indicates that the alleged demotion was merely part of a reclassification of all professional positions in the Petitioner's Group. In this regard, see pages 168 to 170 of the hearing transcript for July 30, 1981.

The first substantive issue in this case is whether the Petitioner was denied a promotion to the GS-14 level on the basis of his age (over 40) and sex (male). As noted above, the record clearly establishes that a white female under the age of 40 was selected for that position and that the Respondent has an affirmative action program designed to encourage managers to select minorities and females for positions at the senior level (GS-13 through GS-15). A thorough review of the EEO Investigative File (Exhibits A - AA) in this case, particularly the Report of Investigation (Exhibit A) demonstrates that, statistically, females are under-represented at the GS-13 through GS-15 levels. While several witnesses<sup>1</sup> who testified at this Hearing stated their belief that Ms. Drake was promoted because of her sex or because of favoritism toward her by Mr. Ramey's immediate supervisors, there is an equal or greater amount of testimony that contradicts these assertions.<sup>2</sup> However, no evidence was presented indicating that age was a factor in Ms. Drake's selection.

The evidentiary standard applicable to such cases was initially articulated by the Supreme Court of the United States in the case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Supreme Court reaffirmed this standard more recently in the case of Texas Department of Community Affairs v. Burdine, 25 FEP Cases 113, 115 (1981), as follows:

"First, the plaintiff has a burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection.... Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reason, but were a pretext for discrimination.

"The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

To satisfy the initial burden of proving a prima facie case, McDonnell Douglas requires a four-pronged test: (1) Petitioner belongs to a protected class or group--male and over 40 years of age here; (2) Petitioner applied and was qualified for a position for which the employer sought applicants--a GS-14 vacancy here; (3) despite Petitioner's qualifications, he was not selected for the position; and (4) that sex and/or age was a factor in the Petitioner's nonselection for the position.<sup>3</sup> The crux of this four-pronged test is whether the evidence presented by the Petitioner is sufficient to create at least an inference that discrimination on the basis of sex or age (or both) was the likely reason for Petitioner's nonselection for the GS-14 vacancy. Unless such an inference is created by the evidence, the burden does not shift to the employer to articulate a legitimate, nondiscriminatory reason for Petitioner's rejection. While such an inference is often premised on circumstantial evidence alone, the mere assertion of the inference does not satisfy the four-pronged test of McDonnell Douglas.<sup>4</sup>

In the instant case, such an assertion was made regarding the Petitioner's age, i.e., over 40, but no evidence was presented--even circumstantially--to support this assertion. Hence, the Petitioner failed to meet his burden of proof to create an inference that his nonselection was based (at least in part) on his age.

As to the Petitioner's sex (male), the EEO Investigative File (see particularly Exhibits A and P) and the hearing transcripts indicate that Ms. Drake's selection for the GS-14 vacancy may have been influenced at least in part by her sex (female). However, Petitioner did not adduce any evidence at the hearing that his nonselection was in any manner attributable to his sex. Nevertheless, even assuming that the burden

shifted to Respondent to come forward with a legitimate, nondiscriminatory reason for Petitioner's rejection, Respondent stated that Ms. Drake and at least seven other candidates were better qualified to fill the position, as evidenced by the ratings for the nine qualified applicants (see Exhibit Y).

Under McDonnell Douglas, *supra*, as rearticulated in Burdine, *supra*, the burden then shifted back to Petitioner to demonstrate either by direct evidence that a discriminatory reason more likely motivated the Respondent not to select the Petitioner or by showing indirectly that the Respondent's proffered explanation was unworthy of credence.<sup>5</sup> The Petitioner did not produce any direct evidence that a discriminatory reason, i.e., sex, motivated Respondent not to select the Petitioner. Nor did Petitioner demonstrate persuasively by indirect evidence that the Respondent's explanation that of the nine qualified applicants for the position Petitioner was the least qualified, was unworthy of belief.

Petitioner did demonstrate by his prior performance appraisals (see Exhibits H-9 through H-14) and the testimony of his previous supervisor--Earl M. Wysong, Jr.--that Petitioner was at least "qualified" for consideration for the GS-14 vacancy. Moreover, Petitioner did adduce evidence (see Exhibit Y) that he was rated the lowest of the nine applicants on the Certificate of Eligibles for the vacancy, four of whom were females and five males. Additionally, ample evidence was presented<sup>6</sup> demonstrating that the Petitioner and his immediate supervisor were constantly at odds. The evidence also showed that Respondent had at least two other rationales for Petitioner's nonselection--the level of Petitioner's performance and conduct.<sup>7</sup> Respondent offered the testimony of Messrs. Kearns, Donlon and Reifsnyder for this purpose. Indeed, the most salient evidence on this point is the testimony of the selecting official, Jack D. Kearns, at page 169 of the hearing transcript for August 4, 1981:

Q. All right, is your testimony then that you rated him [Petitioner] proficient with the -- the knowledge and intention that -- that he would not show up on the -- before a selection panel with that rating?

A. That is right.

While these rationales may have been the true motivation for Petitioner's nonselection for the GS-14 vacancy, there is no evidence that the Respondent or its supervisors were motivated to deny Petitioner the promotion for discriminatory reasons, i.e., on the basis of sex or age.

Thus, the evidence in this case demonstrates that:

- (1) Petitioner applied for the GS-14 vacancy;
- (2) Petitioner was qualified for the vacancy;
- (3) Petitioner was not selected to fill the vacancy;
- (4) A female was selected to fill the vacancy;
- (5) Petitioner and Mr. Kearns were constantly at odds;
- (6) Mr. Kearns and his supervisors did not consider Petitioner fully qualified to fill the vacancy because of the level of his performance and his conduct;

(7) The individual selected to fill the vacancy may have benefited (at least in part) by her sex in being selected for the position;

(8) Seven other candidates, both male and female, were rated higher than the Petitioner but lower than the individual selected to fill the vacancy; and

(9) Therefore, even if Ms. Drake had not been selected to fill the vacancy, the Petitioner would not have been selected.

Contrastingly, the evidence presented did not establish that:

(1) Petitioner was not selected to fill the vacancy because of his sex;

(2) Respondent was discriminatorily motivated in not selecting the Petitioner to fill the vacancy;

(3) The Respondent's reasons for Petitioner's non-selection are unworthy of belief; or

(4) The Petitioner's supervisors were motivated to deny Petitioner the promotion for discriminatory reasons.

Accordingly, in light of the evidentiary standard set forth in McDonnell Douglas and the evidence presented here, the Board concludes that the Petitioner's nonselection was not because of his age or sex.

The remaining issue for consideration is whether the Petitioner was denied his within-grade salary increase due June 14, 1981, in retaliation for his having filed an EEO complaint against Kearns, Donlon, etc. Since no procedural irregularities were alleged or shown, the denial must be evaluated on the merits in the light of the surrounding circumstances.

As set forth in Petitioner's Exhibit HH, the genesis for the denial was the alleged failure of Petitioner to complete four tasks relative to the Respondent's evaluation of the Department of Housing and Urban Development (HUD) payroll system, and a fifth task relative to "the approved systems microfiche file."<sup>8</sup>

Testimony from witnesses for the Respondent was to the effect that Ramey had been a problem employee for a long time.<sup>9</sup> Further, it was alleged that Mr. Kearns did not consider Petitioner's performance to be at an acceptable level of competence from the time Kearns was first selected as Petitioner's supervisor in December 1979.<sup>10</sup> However, the record also reveals that the first such counseling or warning session between the Petitioner and Kearns did not occur until September 23, 1980, nearly ten (10) months after Kearns was selected as Petitioner's supervisor.<sup>11</sup> (See Respondent's Exhibit 15). The substance of this counseling session was set forth in a September 24, 1980, memorandum from Kearns to Donlon (see Respondent's Exhibit 15). However, the Petitioner was not provided a copy of this document.<sup>12</sup> Also on this date, Kearns was contacted by the EEO Counselor assigned to Petitioner's informal EEO complaint (see Exhibit E). Moreover, approximately six weeks earlier, on August 5, 1980, Kearns rated the Petitioner as fully competent and qualified to perform all the duties and responsibilities of his position (see Petitioner's Exhibit A6). Two days after the September 23, 1980, meeting, Kearns held another meeting with Petitioner, concerning an official warning notice issued the previous day (see Respondent's Exhibit 16) to Petitioner by Kearns regarding the Petitioner's sleeping during duty hours. While this meeting and a subsequent meeting the same day among Petitioner, Kearns and Donlon concerned this warning notice and hence conduct, nevertheless, Kearns characterized these meetings as performance-related.<sup>13</sup> While a

memorandum to record (see Respondent's Exhibit 17) was prepared by Kearns, the Petitioner was not provided with a copy of it.<sup>14</sup>

The next relevant incident occurred at a meeting on January 28, 1981, among Petitioner, Reifsnyder, Mr. Dasher and representatives from HUD regarding the ADP portion of the GAO audit of HUD accounting/ADP systems. Again, a memorandum (see Respondent's Exhibit 14) of the meeting was prepared, but Petitioner was not provided a copy of it.<sup>15</sup> On April 6, 1981, Kearns conducted another counseling session with Petitioner and prepared a memorandum to file (see Respondent's Exhibit 22) on this meeting. Then, on April 14, 1981, Petitioner was issued a warning notice (see Petitioner's Exhibit GG) of possible denial of his within-grade salary increase. However, it was not until April 29, 1981,<sup>16</sup> that Kearns met with Petitioner regarding his warning notice and assigned Petitioner the five tasks which were the subject of the June 12, 1981, denial of within-grade salary increase. In this regard, Kearns testified that he had actually assigned the first four tasks to Petitioner in February 1981,<sup>17</sup> but that Petitioner had failed to complete these tasks--an allegation which Petitioner vehemently denied, noting that these tasks were part of his HUD payroll assignment for which his completion date was September 30, 1981--See Petitioner's Exhibits A2, A3 and A4. Then, on May 22, 1981, a meeting was held among representatives from GAO and HUD regarding the GAO audit of HUD. Here, the testimony of Respondent's witness, Reifsnyder,<sup>18</sup> and Petitioner's witness, Floyd,<sup>19</sup> are in utter conflict as to the purpose and scope of this meeting. Similarly, the testimony of Respondent's witness, Reifsnyder,<sup>20</sup> and the deposed witness, Dasher,<sup>21</sup> are at odds regarding a meeting held on May 22, 1981, among Reifsnyder, Dasher, Petitioner and a fourth GAO employee regarding the HUD audit. Finally, on June 12, 1981, Petitioner was given notice of denial of his within-grade salary increase.

Furthermore, contrary to the position espoused by Respondent that Petitioner had been a problem employee is the documentary record here. Exhibits H-9 through H-14, prior annual performance appraisals of Petitioner, indicate that Petitioner was annually rated as satisfactory or better. Additionally, as evidenced by Exhibit V, Petitioner was included on the Certificate of Eligibles for the GS-14 vacancy which is the subject of this case. While Respondent would have the Board believe that Petitioner was not performing at an acceptable level of competence for a long time, the documentary evidence does not support Respondent's position in this regard.

Thus, in evaluating the entire record in this case, the Board considered as significant the following:

- (1) Petitioner was not counseled by Kearns until nearly 10 months after Kearns' selection as his supervisor;
- (2) In August 1980, Kearns found Petitioner's performance to be satisfactory, but six weeks later he initiated a counseling session with Petitioner;
- (3) Petitioner's previous supervisors consistently found Petitioner's performance to be satisfactory or better;
- (4) Kearns' initial counseling session with Petitioner occurred one day after Petitioner initiated his informal EEO complaint and one day before Kearns met with Petitioner's EEO Counselor;
- (5) The evidence is contradictory as to whether the accounting group headed by Reifsnyder or the ADP group headed by Kearns was responsible for the delays in completing the HUD audit in a timely fashion;

(6) The testimony is in conflict as to the nature of various meetings held in 1981 in which Petitioner, Reifsnnyder, Dasher and others participated regarding the HUD audit;

(7) Petitioner had a target date of September 30, 1981, to complete his portion of the HUD project, not June 12, 1981; and

(8) While there may well have been serious problems with Respondent's audit of HUD, Petitioner was not the source of those problems.

Accordingly, on the record as a whole, the Board is persuaded that the facts in evidence in this case indicate that:

(1) There is at least circumstantial evidence that the Petitioner was denied his within-grade salary increase at least in part because of his having filed a complaint of discrimination against Kearns and other management officials; and

(2) The evidence presented by Respondent does not substantiate the grounds relied upon by management in denying the Petitioner's within-grade salary increase.

Therefore, the Board finds that Respondent improperly denied Petitioner's within-grade salary increase due June 14, 1981.

### **Decision**

The Petitioner's request for retroactive promotion to GS-14 position on the basis of discrimination because of age and sex is denied. The Petitioner's request for retroactive granting of his within-grade salary increase is hereby granted. The Respondent is directed to provide the Petitioner with his within-grade salary increase retroactive to June 14, 1981. Agency records should be corrected consistent with this Decision.

### **Notes**

1. Austin James Dayton, Jr., at pp. 135-136, 141-141 of the hearing transcript for July 7, 1981; Lee Beaty at p. 186 of the hearing transcript for July 30, 1981; and Petitioner at pp. 129-141 of the hearing transcript for July 30, 1981.

2. Ken W. Leland at p. 18 of the hearing transcript for July 30, 1981; Joseph H. Donlon at pp. 209-217 of the hearing transcript for July 30, 1981, and pp. 209-215 of the hearing transcript for August 4, 1981; Jack D. Kearns at pp. 60-76 of the hearing transcript for July 7, 1981, and at pp. 135-138, 140, 151-158, 166 and 182-191 of the hearing transcript for July 31, 1981; and Gerald Derydder at pp. 268-270 of the hearing transcript for August 4, 1981.

3. See Hagans v. Andrus, 25 FEP Cases 503, 506 (9th Cir. 1981). Alternatively, the fourth prong of this test could be stated as follows: that the individual selected to fill the position was not of the same class, i.e., sex or age, as the Petitioner. However, even applying that alternative here, the results in this case would be unchanged. Regardless of how the fourth prong of the test is stated, unless Petitioner makes out a prima facie case, the burden does not shift to Respondent.

4. McDonnell Douglas v. Green, supra at 804-805.

5. Id.

6. Earl M. Wysong, Jr., at p. 82 of the hearing transcript for July 30, 1981; Gloria Gatewood at p. 175 of the hearing transcript for July 30, 1981; and Joseph H. Donlon at p. 225 of the hearing transcript for July 30, 1981.

7. See Kearns' testimony generally at pp. 32-118 and 151-158 of the hearing transcript for July 7, 1981, pp. 230-259 of the hearing transcript for July 31, 1981, and pp. 9-195 of the hearing transcript for August 4, 1981; and Donlon's testimony at pp. 215-247 of the hearing transcript for August 4, 1981.

8. See page 1 of Petitioner's Exhibit HH.

9. Donlon at p. 221 and pp. 224-231 of the hearing transcript for July 30, 1981; and Reifsnyder at pp. 143-160 of the hearing transcript for July 31, 1981.

10. Kearns at pp. 232-233 of the hearing transcript for July 31, 1981.

11. In his testimony, Kearns alleged that counseling sessions also occurred in January 1980, and on June 6, 1980. See pp. 244-251 of the hearing transcript for July 31, 1981. However, this testimony was not corroborated by documentary or testimonial evidence and there was no evidence on the record that Petitioner admitted to participating in either alleged counseling session.

12. See Kearns' testimony at p. 252 of the hearing transcript for July 31, 1981.

13. See Kearns' testimony at pp. 9-11 of the hearing transcript for August 4, 1981.

14. See Kearns' testimony at p. 15 of the hearing transcript for August 4, 1981.

15. See Reifsnyder's testimony at pp. 209 and 217 of the hearing transcript for July 31, 1981.

16. Kearns at pp. 40-41 of the hearing transcript for August 4, 1981.

17. See. p. 243 of the hearing transcript for July 31, 1981.

18. p. 138-229 of the hearing transcript for July 31, 1981.

19. p. 197-200 of the hearing transcript for August 4, 1981.

20. p. 158-161 of the hearing transcript for July 31, 1981.

21. p. 21-23 and 49-53 of July 22, 1981 Deposition.